

August 27, 2019

To: Hon. George Latimer
County Executive

Hon. Benjamin Boykin
Chair, County Board of Legislators
Legislator, 5th District

From: John M. Nonna
County Attorney



Stacey Dolgin-Kmetz
Chief Deputy County Attorney

Linda M. Trentacoste
Deputy County Attorney

Re: Board of Elections – Purchasing of Voting Machines

You have requested a legal opinion regarding the Westchester County Board of Elections' authority regarding the purchase of voting machines for Westchester County.

BACKGROUND:

On July 29, 2019, the County Board's Committees of Budget and Appropriation and Public Works met with the Commissioners of the Board of Elections. Chair Boykin requested that the Commissioners work with the Law Department to prepare any bond documents necessary relating to early voting requirements for the County Board's review and final approval.

On or about Monday, August 19, 2019, Chair Boykin ascertained that the County Board of Elections ("WCBOE") had already purchased the voting machines, electronic polling books and printers for Westchester County.

Instead of requesting bond authorization, the WCBOE used available operating funds (materials and supplies) to move forward with the equipment purchases needed for early voting. According to the information received by Chair Boykin, the Budget Department informed the WCBOE that there were sufficient monies available from the General Fund Operating budget

(materials and supplies) to cover the cost of these equipment purchases so that it was unnecessary to bond for the costs.

Additional details regarding WCBOE expenditures and the costs of equipment purchases for voting were provided to the Chair. Specifically, the County will receive State Aid of approximately \$1.3 million (\$750,000 for capital + \$550,000 for personnel costs) for early voting. Of the \$1.3 million in State Aid, \$553,110 will be offset against the General Fund Operating budget for the purchases for early voting (see details of the amounts below). The remaining amount of \$746,890 (\$1,300,000-\$553,110) will be used to offset future capital costs.

The Budget Department provided Chair Boykin with the following information:

Description	Cost
30 ImageCast Evolution Tabulator/BMD by Dominion Voting Systems Corporation.....	\$325,100.00
32 Poll printers by Knowink Innovative Election Solutions.....	152,960.00
50 Electronic Poll Books (Poll Pad Units) by Knowink Innovative Election Solutions.....	75,050.00
Total.....	\$553,110.00

The CE's staff and County Attorney are looking into the process by which the WCBOE was authorized to acquire these equipment purchases.

DISCUSSION:

- I. HAVA and New York State Election Law dictate that WCBOE, like other local boards of election, operate semi-autonomously from the control of the local government officials, *i.e.*, Westchester County Executive and the County Board of Legislators, with respect to the purchase of voting machines.

In 2002, in order to improve the accessibility of voting systems to disabled voters, Congress enacted the Federal Help America Vote Act (hereinafter "HAVA") (*see* 42 USC § 15301 et seq.). In an effort to comply with HAVA, the New York State Legislature enacted the Election Reform and Modernization Act of 2005 (hereinafter "ERMA") (*see* Laws of 2005, chap. 181), which, as later amended, requires the replacement of lever voting machines with electronic optical scan voting systems (*see* Laws of 2007, chap. 506, § 1; New York State Election Law (hereinafter "Election Law") § 7-202).

The New York State Board of Elections ("SBOE") already had the assistance of local boards of election to implement the provisions of both Federal and State laws. Election Law § 3-200(1) specifically mandates the creation of a board of elections in each county, *e.g.*, WCBOE.

Election Law § 3-226 further provides that the local boards of election, like WCBOE, are mandated to “direct the purchase, acquisition or lease of voting machines, of a kind authorized by law, which shall be selected by such board...” In addition, the local boards of election are responsible for the care, custody and control of all voting machines, and appliances and equipment relating to or used in the conduct of elections. Election Law § 3-226. All expenses of local boards of election, with very limited exceptions, are to be paid by the county.

Furthermore, Election Law § 7-200 specifically addresses the issue of the “Adoption and use of voting machine or system” by placing the responsibility on the county boards of elections to use a voting machine or system approved by the state board of elections, or specifically authorized by law. This section also limits the scope of that authority by local boards of election by prohibiting the use of more than two types of voting machines or systems at a single election.

Moreover, Election Law § 7-203(3) anticipates problems associated with the purchase or award of a contract for voting machines and provides that “[i]n the event that the board of elections shall not agree upon, or the county shall not execute a contract or contracts for the purchase of, the necessary voting machines, such contract or contracts shall be awarded, made and executed by the state board of elections” and the all the costs associated with the expense of making and entering into such contracts and the acquisition of such machines “shall be chargeable to the county”. This section further enforces the supremacy of the Election Law by providing that “No provision of any charter or other law or ordinance governing the purchase of patented articles shall be deemed to apply to the purchase of voting machines pursuant to the provisions of this section...”

Consequently, as a result of the mandates of HAVA and the Election Law, WCBOE operates semi-autonomously from the control of the Westchester County Executive and the County Board of Legislators with respect to the purchase of voting machines.

Recent case law provides further clarification with respect to the authority of local board of elections with respect to purchase and use of voting machines.

In 2006, the United States Department of Justice commenced an action against the SBOE and New York State seeking an injunction requiring compliance with HAVA. The parties to that action reached an agreement, which resulted in a remedial order placing the State and the SBOE under various conditions, including a timeline for compliance. As a result of that agreement, the State and the SBOE commenced legal action against some of the local board of elections. In one case, a Federal District Court issued an injunction in favor of the State and SBOE against the county of Nassau which ordered the County to cease its interference with efforts to take actions necessary to implement the new voting machines. The District Court’s Order granting the preliminary relief was affirmed by the Second Circuit Court of Appeals in *United States v New York State Bd. of Elections*, 312 Fed Appx 353 (2d Cir 2008).

In another case, the *Matter of the County of Nassau v State of New York*, 100 A.D.3d 1052 (3d Dep’t 2012), Nassau County attempted to challenge the constitutionality of ERMA and the Appellate Division held that Nassau County lacked the capacity necessary to maintain such a lawsuit as follows:

Here, the County asserts “ ‘that if [it is] obliged to comply with the State statute [it] will by that very compliance be forced to violate a constitutional proscription’ ” (*City of New York v State of New York*, 86 N.Y.2d at 292, quoting *Matter of Jeter v Ellenville Cent. School Dist.*, 41 N.Y.2d 283, 287, 360 N.E.2d 1086, 392 N.Y.S.2d 403 (1977); see *Matter of County of Oswego v Travis*, 16 A.D.3d at 735), thereby coming within an exception. However, the County cannot claim that, by complying with ERMA, it will be forced to violate a constitutional prohibition, ***because it is the NCBOE—not the County—that is responsible for the implementation of the requirements of ERMA.*** Indeed, nowhere is it alleged in the petition/complaint that the County plays any role in the administration of ERMA or the selection of voting machines. Rather, the petition/complaint specifically alleges that it is the NCBOE that “is responsible for carrying out the elections in Nassau County,” which responsibility includes, among other things, “[s]electing new voting systems approved by the [SBOE] and ERMA.” And, ***the Election Law confirms that it is the local board of elections that is charged with the selection and implementation of voting systems and machines*** (see Election Law §§ 3-226, 7-200 (1); 7-208). ***Notably, in this regard, the NCBOE does not act on behalf of the County, but is rather an independent political body separate and distinct from the County*** (see *Matter of Reynolds*, 202 N.Y. 430, 441, 96 N.E. 87 (1911); *Matter of Daly v Board of Elections of City of N.Y.*, 254 App. Div. 914, 914, 5 N.Y.S.2d 633 (1938), *affd* 279 N.Y. 743, 18 N.E.2d 689 (1939)).

Similarly, it is the WCBOE and not the Westchester County Executive or the Westchester County Board of Legislators that is charged with the selection and/or the implementation of voting systems and machines.

- II. Westchester County Budget passed in 2018 for FY2019 provides for the necessary funding to pay for the WCBOE’s purchases.

There are several provisions of the Westchester County’s 2019 Budget that contain moneys appropriated for use by the WCBOE. The 2019 Capital Budget notes that the Board of Elections has Project No. BEL01 for the Purchase of Voting Machines, with Gross Appropriations for 2018 in the amount of \$4,620,000. In addition, page C-78 provides the WCBOE with operating budget expenditures generally for (1) equipment in the amount of \$49,500, (2) material and supplies in the amount of \$1,769,100 and (3) expenses in the amount of \$4,068,900. Page B-12 contains the County’s 2019 Operating Budget Summary –Appropriations Assigned for Purchases on Order which for the WCBOE is in the amount of 376,558. All of these provisions illustrate that the County had already appropriated money to the WCBOE that could be utilized in connection with

the purchase of voting machines and other equipment necessary for compliance with Federal and New York State law.

- III. This action does not require specific authorization by the County Executive or the County Board of Legislators or the County Board of Acquisition and Contract

In accordance with the provisions of the Westchester County Charter Section 119.51, the Purchasing Agent has the express statutory authority to make purchases of all supplies, materials and equipment required by any county department, institution, office or agency. *See also*, Chapter 836 of the Laws of Westchester County entitled "Purchase and Sale of Equipment and Supplies"; Laws of Westchester County Section 229.41; Westchester County Procurement Policy. Pursuant to Sections 161.01 and 161.11(1) of the Westchester County Charter, contracts executed by the Bureau of Purchase and Supply for the purchase of equipment are specifically and statutorily exempt from the proceedings before the Board of Acquisition and Contract.

The Purchasing Agent's purchase of the equipment from Dominion Voting Systems Corporation and Knowink Innovative Election Solutions on behalf of the WCBOE is consistent with law. The equipment from Dominion Voting Systems Corporation is based off of a New York State approved contract and the items from Knowink are "sole source" insofar as they are the only electronic poll book and on demand ballot printing systems that are compatible with Dominion Voting Systems.

Please let us know if we may be of further assistance.

JN/SDK/LMT/nn